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In the
Supreme Court of the United States

CBOCS WEST, INC.,
Petitioner,

v.

HEDRICK G. HUMPHRIES,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

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ARGUMENT

This case presents only one legal issue for this Court's analysis – whether a cause of action based on retaliation is cognizable under 42 U.S.C. § 1981 ("Section 1981"). Respondent and his *amici*, however, divert attention away from the clear language of Section 1981, which does not protect against retaliation, instead focusing on racial discrimination and various policy issues. Respondent does not address the distinction Congress and this Court have recognized between discrimination based on an individual's status and retaliation based on an individual's conduct. *See Burlington N. and Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 412, ___ U.S. ___ (2006) (noting Congress' distinction between discrimination and retaliation in Title VII – "[t]he substantive provision [addressing race] seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct.") (Breyer, J.). Furthermore, Respondent does not address the same distinction he, in fact, recognized in all lower court proceedings in this case.

Unable to find any reference to retaliation in Section 1981's text, Respondent relies on the proposition that Section 1981 creates rights that do not depend on the existence of racial discrimination. *See* Resp. Br. 15-31. Respondent ignores the modifying phrase "as is enjoyed by white citizens" that specifically defines and limits the application and scope of Section 1981. This language, as determined when reviewing Section 1981, limits any cause of

action under Section 1981 to racial discrimination in the making and enforcement of contracts, and as such excludes retaliation.

Because Section 1981 does not protect against retaliation, Respondent asks this Court to construe Section 1981 to include such protection. Resp. Br. 38. Respondent claims that such a construction is necessary in order to effectuate a policy interest found within Section 1981. Respondent's policy arguments for this proposition, however, fail because they require this Court to disregard its constitutional powers and infringe on those powers the Constitution provides to Congress. *Compare* U.S. CONST. ART. I, *with* U.S. CONST. ART. III.

Respondent continues his argument by relying on *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 299 (1969), and *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), claiming that *stare decisis* requires this Court to affirm the Seventh Circuit's decision. Petitioner will briefly address Respondent and *amici*'s erroneous reliance on these two cases and their attempt to invoke *stare decisis*, which is inappropriate in this case.

Finally, Respondent attempts to divert this Court's attention by inaccurately stating his allegations as pled and argued below, as well as the lower courts' holdings in this case. Respondent's descriptions of racial discrimination, both in theory and as alleged at the District Court, are irrelevant to the issue before the Court given the procedural history of this case. Respondent's only remaining cause of action (despite suggestions to the contrary) is retaliation, a cause of

action that does not exist under the plain language of Section 1981.

Petitioner requests only that this Court overrule the Seventh Circuit's decision, which, without any textual support, created a cause of action based on retaliation under Section 1981. In this case, the Seventh Circuit overstepped its constitutional powers and infringed on those lawmaking powers reserved to Congress, an act this Court should not allow.

I. RESPONDENT CONFUSES THE ISSUE IN THIS CASE BY ATTEMPTING TO REVIVE A RACIAL DISCRIMINATION CLAIM UNDER THE GUISE OF RETALIATION.

Petitioner supports civil rights and equality, and there is no question that Section 1981 "reflects society's consensus that discrimination based on the color of one's skin is a profound wrong of tragic dimension." *Patterson v. McLean Credit Union*, 491 U.S. 164, 188 (1989). Section 1981, however, "is only one part of Congress' extensive civil rights legislation," *see id.*, and it does not provide for a cause of action based on retaliation. Indeed, as recently as 2006, this Court noted that Section 1981 was not "meant to provide an omnibus remedy for all racial injustice." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 479 (2006). As Justice Kennedy stated in *Patterson*, 491 U.S. at 185 n. 6, the task of the Court "is not to construe § 1981 to punish all acts of discrimination in contracting in a like fashion, but rather merely to give a fair reading to [the] scope of the statutory terms used by Congress." A fair reading of Section 1981 leads to

the reasonable conclusion that it does not protect against retaliation.

Respondent ignores Section 1981's text and begins his argument by suggesting that *Burlington Northern*, 126 S. Ct. at 2412, stands for the proposition that Section 1981 prevents injury based on both an individual's status and his conduct. Resp. Br. 15. *Burlington* does not stand for this proposition, and Section 1981's language does not support such a conclusion. The language cited by Respondent is language used by this Court, when analyzing Title VII, to note the distinction Congress has made between discrimination based on a protected category/class and retaliation based on an individual's conduct – a necessary and proper distinction for a full analysis of the arguments in this case. *See Burlington N.*, 126 S. Ct. at 2412 ("The substantive provision [addressing race] seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct.") (Breyer, J.).

Respondent attempts to link a retaliation claim to Section 1981 by referring to retaliation, but, in actuality, describing examples of racial discrimination. Resp. Br. 12 ("Section 1981 prohibits treating a subset of black workers differently than comparable white workers. . . . It cannot fire black complainers, but not white complainers"); Resp. Br. 23 ("The statute thus bars an employer from carrying out a policy of forbidding black but not white workers from 'giv[ing]' evidence."); Resp. Br. 23 ("Section 1981 would be violated if, in order to prevent blacks from testifying, an employer refused to give the black (but not white)

employees the time off from work necessary to testify, or hired thugs to physically bar black workers from entering the courthouse."); Resp. Br. 23-24 ("Section 1981 would equally be violated if [an] employer, after its workers had succeeded in giving evidence, singled out and dismissed the black workers who had done so."); Resp. Br. 27 ("If . . . [Petitioner] retaliated against [Respondent] because he was a black worker who exercised his right to enjoy that benefit, that reprisal also violated section 1981."[1]); Resp. Br. 32 ("[S]ection 1981 requires that [Petitioner] treat black and white complainants alike"); Resp. Br. 33 ("[S]ection 1981 forbids an employer from having one dismissal policy for blacks who complain about race discrimination, and another for whites who complain about such discrimination."). Petitioner does not dispute that Section 1981 forbids treating an African American differently than a Caucasian in the making and enforcing of contracts. That, however, is not the issue before this Court.

Indeed, much of the case law Respondent relies upon describes racial discrimination, not retaliation. *See e.g.*, *Runyon v. McCrary*, 427 U.S. 160, 173 (1976) (private schools violated Section 1981 by denying students "admission to the schools because of [the students'] race"); *Hurd v. Hodge*, 334 U.S. 24, 34 (1948) ("Solely because of their race and color [Petitioners were] confronted with orders of court

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[1] Petitioner excludes the language "as is alleged here" from this quotation because, as is explained later in this Reply Brief, Respondent did not allege what he claims to allege in this statement.

divesting their titles in the properties and ordering that the premises be vacated," a violation of 42 U.S.C. § 1982).

Respondent even analogizes a Title VII gender discrimination case, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1970), to his case. Resp. Br. 32-33. *Martin Marietta* is a gender discrimination case (not a retaliation case) in which this Court found that Title VII's discrimination provision forbids an employer from having "one hiring policy for women and another for men – each having pre-school-age children." *Martin Marietta*, 400 U.S. at 543. In analogizing *Martin Marietta* to Respondent's case, Respondent argues that it would be a Section 1981 violation to retaliate against African American employees who complain, but not Caucasian employees who complain. Petitioner agrees that such facts would state a claim for racial discrimination under Section 1981 because the employer would be treating a subset of African Americans differently than a subset of similarly situated Caucasians. However, Respondent's only remaining claim is one based on retaliation, not racial discrimination.

The above demonstrates that Respondent is confusing the question presented by masking his only remaining claim – a retaliation claim – as a newly formulated racial discrimination claim. The District Court and Seventh Circuit have both held that Respondent abandoned all claims based on racial discrimination. *See* JA 115 ("Although Humphries' complaint contends that his termination was motivated both by racial animus and by retaliation for his prior complaints, it is apparent from the

presentation he makes in his opposition papers that only the retaliation claim has any vitality."); JA 158 ("We agree with the district court's determination that [Respondent] waived . . . his discrimination claim by devoting only a skeletal argument in response to [Petitioner's] motion for summary judgment."). Respondent has not appealed his racial discrimination claims.

While attempting to turn his retaliation claim into a racial discrimination claim, Respondent fails to reconcile his newly formulated cause of action with his previous admissions and pleadings, which illustrate his clear understanding of the difference between retaliation and racial discrimination. *See* Resp. Br. 26 ("The First Amended Complaint alleges that [Petitioner] retaliated against [Respondent] for making . . . complaints."); Resp. Br. 35 ("[Respondent] contends that [Petitioner] retaliated against him because he opposed acts of racial discrimination"). *See also* JA 50-52 (Respondent distinguishing between retaliation and racial discrimination in his Complaint); R. 52 (6/28/05, Plaintiff's Response to Defendant's Motion for Summary Judgment) (distinguishing between retaliation and racial discrimination); 12/19/05, Plaintiff-Appellant's Brief and Required Short Appendix (distinguishing between retaliation and racial discrimination before the Seventh Circuit); 2/1/06, Plaintiff-Appellant's Reply Brief (distinguishing between retaliation and racial discrimination before the Seventh Circuit).

Despite Respondent's arguments to the contrary, it is clear that Section 1981 only protects against racial discrimination (not retaliation) in the "making and

enforcing" of contracts. *See Domino's Pizza*, 546 U.S. at 476 ("Section 1981 offers relief when **racial discrimination** blocks the creation of a contractual relationship, as well as when **racial discrimination** impairs an existing contractual relationship") (emphasis added); *Patterson*, 491 U.S. at 171 (Section 1981 "prohibits racial discrimination in the making and enforcing of private contracts") (internal quotation omitted); *Runyon*, 427 U.S. at 168 (Section 1981 "prohibits racial discrimination in the making and enforcement of private contracts"); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 286-287 (1976) (Section 1981 is applicable to "racial discrimination"); *Georgia v. Rachel*, 384 U.S. 780, 791 (1966) (noting the "racial character" of the the phrase "as is enjoyed by white citizens," which is used in section 1981).

As explained in Petitioner's Merits Brief and in this Reply to Respondent's Brief, the language of Section 1981 does not provide for a cause of action based on retaliation as Respondent asserts. In fact, Respondent's analysis suggests that he, too, is aware of Section 1981's scope.

II. RESPONDENT IGNORES THE TEXT OF SECTION 1981 BY SUGGESTING THAT IT CREATES RIGHTS THAT ARE NOT MODIFIED BY THE CLAUSE "AS IS ENJOYED BY WHITE CITIZENS."

Respondent focuses much of his Brief on what he terms the "rights-creating language" of Section 1981. Resp. Br. 15-31. Respondent and his *amici*, however, exclude from their analysis the specific modifying

language in Section 1981 – "as is enjoyed by white citizens."

As explained above, Section 1981 has consistently been read as a statute forbidding racial discrimination in the making and enforcement of contracts. *See Domino's Pizza*, 546 U.S. at 476; *Patterson*, 491 U.S. at 171; *Runyon*, 427 U.S. at 168; *Santa Fe Trail Transp.*, 427 U.S. at 286-287; *Rachel*, 384 U.S. at 791. Respondent's argument would require the Court to redact from Section 1981 the specific phrase "as is enjoyed by white citizens" in order to create a more favorable reading for Respondent. The phrase is clear and absolutely essential for an understanding of Section 1981's scope.

Section 1981 has not been, nor can it be, read as a statute creating rights not subject to the modifier "as is enjoyed by white citizens." Respondent cites to the Labor-Management Reporting and Disclosure Act and the First, Fifth, and Sixth Amendments of the Constitution to support the idea that certain acts of retaliation for exercising a right can be actionable. *See* Resp. Br. 19-20. By comparing these statutory and constitutional provisions to Section 1981, Respondent is asking the Court to ignore a clear modifier in Section 1981 – "as is enjoyed by white citizens."

The Court, however, cannot ignore the express language adopted by Congress. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) ("As in any case of statutory construction, [the Court's] analysis begins with 'the language of the statute.'"). *See also Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004); *Hartford Underwriters Ins. Co. v. Union Planters*

Bank, N.A., 530 U.S. 1, 6 (2000); *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989); *Caminetti v. United States*, 242 U.S. 470, 485 (1927); *Bate Refrigerating Co. v. Sulzberger*, 157 U.S. 1, 33 (1894); *Lake County v. Rollins*, 130 U.S. 662, 670 (1889). Section 1981 specifically prohibits racially discriminatory behavior where such behavior denies an individual the ability to make and enforce a contract. A broader finding would ignore the distinction between anti-discrimination provisions and anti-retaliation provisions that Congress made in drafting Section 1981 and Title VII, and the distinction this Court made in *Burlington Northern*, 126 S. Ct. at 2412.

Respondent's only surviving cause of action cannot, and does not, allege any type of racial discrimination behind Petitioner's decision to terminate Respondent. *See* JA 115 and 158. Respondent's allegations state that his retaliation claim stems from his manager's alleged dissatisfaction with him raising concerns "outside of management." JA 49 (Respondent's Complaint). In other words, Respondent's retaliation claim has nothing to do with race, but only the alleged fact that he went "outside of management" or "outside the chain of command" when he complained.

Respondent's claim is simply insufficient to satisfy the basic statutory prerequisites of Section 1981 (*i.e.*, racial discrimination), and his proposal to exclude or ignore a modifier that Congress chose to include is contrary to Section 1981's plain language.

III. RESPONDENT'S AND THE GOVERNMENT'S APPARENT RELIANCE ON 42 U.S.C. § 1981(c) AND 42 U.S.C. § 1981a TO SUPPORT THEIR CONCLUSION IS MISPLACED.

Respondent and the Government appear to suggest two additional arguments to support the idea that Section 1981 should be read to support a cause of action based on retaliation. Both suggestions, however, fail when properly analyzed.

First, both Respondent and the Government appear to suggest that 42 U.S.C. § 1981(c) provides support for Respondent's retaliation claim. Resp. Br. 16; United States Amicus Br. 17. Section 1981(c) states that "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination . . . ." 24 U.S.C. § 1981(c).

This argument ignores the consistent holdings of lower courts that 42 U.S.C. § 1981(c) merely codifies the Court's holding in *Runyon*, 427 U.S. at 168, that Section 1981 applies to private, as well as governmental, actors. *See Dennis v. County of Fairfax*, 55 F.3d 151, 156 n. 1 (4th Cir. 1995); *Oden v. Oktibbeha County*, 246 F.3d 458, 463 (5th Cir. 2001); *Chapman v. Higbee Co.*, 319 F.3d 825, 841 (6th Cir. 2003); *Bolden v. City of Topeka*, 441 F.3d 1129, 1136 (10th Cir. 2006); *Butts v. County of Volusia*, 222 F.3d 891, 894 (11th Cir. 2000). Respondent and the Government even acknowledge Section 1981(c)'s codification of previous Supreme Court holdings that make Section 1981 applicable to private entities. Resp. Br. 3; United States Amicus Br. 22 n. 9.

More importantly, based on its text, Section 1981(c) does not protect individuals from retaliation. Section 1981(c) refers to "the rights protected by this section," namely Sections 1981(a) and (b). Those rights include, relevant to this case, the right to "make and enforce contracts" free from racial discrimination. Section 1981(c) makes clear that such "rights" are now statutorily protected against discrimination by private parties, as well as parties acting "under the color of state law." Nothing in Section 1981(c) divests Section 1981 of the clear modifier in Section 1981(a) – "as is enjoyed by white citizens." In *Domino's Pizza*, 546 U.S. at 476, this Court stated that where a party alleges that his/her "rights" have been impaired, just as Section 1981(c) states, Section 1981 still requires the impairment to be the result of "racial discrimination." It is axiomatic that Section 1981 requires the pleading and proof of racial discrimination. *See id.* (Section 1981 offers relief "when **racial discrimination** impairs an existing contractural relationship") (emphasis added). *See also Patterson*, 491 U.S. at 171; *Runyon*, 427 U.S. at 168; *Santa Fe Trail Transp.*, 427 U.S. at 286-287; *Rachel*, 384 U.S. at 791.

This line of reasoning actually highlights Petitioner's argument that if Congress wanted to include a cause of action based on retaliation in Section 1981, it should have codified it. Congress clearly chose to codify the principle that Section 1981 applies to private actors. *See* 42 U.S.C. § 1981(c). Congress certainly could have codified the principle for which Respondent argues – that Section 1981 protects against retaliation. The only relevant source of Congress' intent, however, is the language it created in

Section 1981 and its *corpus juris*. In Section 1981, Congress did not create protections against retaliation, even though it chose to enact an anti-retaliation provision in another part of the Civil Rights Act of 1991. *See* Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071, Tit. III, § 312 (repealed 1995)[2] (prohibiting "[a]ny intimidation of, or reprisal against," Senate employees for exercising rights under the Government Employee Rights Act of 1991). The fact that Congress chose to codify select aspects of Supreme Court holdings within Section 1981 (*i.e.*, *Runyon*, 427 U.S. at 168) and not what Respondent now argues in favor of (*i.e.*, retaliation) is evidence that Congress intended to exclude the protections Respondent seeks.

Second, Respondent and the Government both suggest that 42 U.S.C. § 1981a(4), which clarifies that damage limitations for Title VII shall not apply to Section 1981, provides support for the proposition that Congress intended Section 1981 and Title VII to coexist. Resp. Br. 42-43; United States Amicus Br. 29. *See also* 42 U.S.C. § 1981a(4) (2006) ("Nothing in this section shall be construed to limit the scope of, or the relief available under . . . 42 U.S.C. § 1981."). It is erroneous, however, to conclude that this congressional statement creates a complete overlap between Section 1981 and Title VII, which Respondent now seeks to use to create identical causes of action in Section 1981 and Title VII. The overlap Respondent and the Government ask this Court to endorse would completely nullify Congress' clear statement in Title

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[2] Section 1317(a) of Chapter 2 of the United States Code now protects all congressional employees against retaliation.

VII that damages for retaliation in the employment context be capped. *See* 42 U.S.C. § 1981a(b)(3) (2006). Respondent and his *amici* request that this Court abolish Congress' chosen damages caps for Title VII in favor of Respondent's proposed creation of a Section 1981 umbrella for all claims remotely related to race in the employment context. This creates an absurd result and nullifies Congress' preference for limitations on damages in the employment context for retaliation.

Respondent can find no reasonable textual support for his retaliation claim under Section 1981. The above arguments reach far beyond the actual text of Section 1981 and do not support Respondent's proposed conclusion.

IV. RESPONDENT'S POLICY ARGUMENTS FAIL AS A MATTER OF PRINCIPLE BECAUSE THE JUDICIARY CANNOT CREATE AN ENTIRELY NEW CLAUSE IN SECTION 1981.

Respondent further contends that "[S]ection 1981's prohibition against race discrimination should be construed to forbid discrimination against an individual because he or she opposed race discrimination." Resp. Br. 38. Taken to its logical conclusion, Respondent's argument must fail because it asks the Court to ignore Section 1981's text and to create an entirely new clause under Section 1981. Respondent's argument in favor of a cause of action based on retaliation has no boundaries, and to create such boundaries, this Court must draft legislation, a power only Congress may exercise. *See* U.S. CONST. ART. I, § 1.

Under Title VII, for example, the anti-retaliation clause Congress enacted states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceedings, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a). This illustrates that Congress took the time to define what constitutes protected activity under Title VII, thus delineating what conduct an employee could engage in and thereby receive protection against retaliation. Section 1981 currently has no such defining provision and/or operative language. The Seventh Circuit, nonetheless, stepped into Congress' shoes and stated simply that Section 1981 protects against retaliation. The Seventh Circuit, however, did not and cannot delineate the boundaries of such a holding. That is a task for Congress. *See* U.S. CONST. ART. I, § 1. Respondent's suggestion that this Court should do the same is contrary to our system of government. *See* THE FEDERALIST NO. 47, at 249 (James Madison) (Phoenix Press Paperback ed., 2000) (quoting Charles Montesquieu for the importance of separation of powers – "were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*"); THE FEDERALIST NO. 78, at 398 (Alexander Hamilton) ("The legislature not only commands the purse but

prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary . . . can take no active resolution whatever."; *id.*, at 403 (noting the benefits of the integrity and moderation of the judiciary, Alexander Hamilton said that "no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today").

Respondent and his *amici* base much of their policy arguments, as did the Seventh Circuit, on the premise that without protection against retaliation, Section 1981 will become a dead letter. Respondent argues that absent the Court's creation of an anti-retaliation provision in Section 1981, employers will freely retaliate against employees. *See* Resp. Br. 38-39. *See also* United States Amicus Br. 27-31. This conclusion ignores the extensive body of civil rights legislation and case law at both the federal and state levels that prohibits retaliation by employers against employees for complaining about discrimination. *See, e.g.*, 42 U.S.C. § 2000e-3(a) (2006); ALASKA STAT. § 18.80.220(a)(4) (Michie 2007); ARIZ. REV. STAT. § 41-1464(A) (2007); CAL. GOV'T CODE § 12940(h) (Deering 2007); COLO. REV. STAT. § 24-34-402(1)(e)(IV) (2007); IOWA CODE § 216.11 (2006); MD. CODE ANN., art. 49B § 16(f) (2007); MASS. ANN. LAWS ch. 151B, § 4 (Law Co-op. 2007); MO. REV. STAT. § 213.070(2) (2007); N.J. STAT. ANN. § 10:5-12(d) (2007); N.M. STAT. ANN. § 28-1-7 (Michie 2007); N.Y. EXECUTIVE LAW § 296(1)(e) (Consol. 2007); NEV. REV. STAT. ANN. 613.340(1) (Michie 2007); OHIO REV. CODE ANN. § 4112.02(I) (Anderson 2007); OR. REV. STAT. § 659A.030(1)(f) (2005); VT. STAT. ANN. tit. 21 § 495(a)(5) (2007); W. VA. CODE ANN. § 5-11-9(7)(C) (Michie 2007); WIS. STAT. § 111.322(2m)-(3) (2006).

In fact, in Illinois, the state in which Respondent alleges Petitioner retaliated against him, regardless of an employer's size, an employee can file suit against an employer for retaliating against him/her for alleging racial discrimination. *See Dana Tank Container v. Human Rights Comm'n*, 687 N.E.2d 102 (Ill. App. Ct. 1997) (holding that an employer not subject to racial discrimination laws of Illinois because it had too few employees was nonetheless liable for retaliation). *See also* 775 ILL. COMP. STAT. 5/6-101(A) (2008) ("It is a civil rights violation for a person, or for two or more persons to conspire, to . . . [r]etaliate against a person because he or she has opposed that which he or she reasonably and in good faith believes to be unlawful discrimination . . . or because he or she has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this Act.").

It defies logic to suggest that employers will adopt policies promoting retaliation because this Court holds in this case that Section 1981 does not allow for a cause of action based on retaliation. Indeed, Respondent was protected, both under Illinois and federal law, against the retaliation he alleges. *See* 775 ILL. COMP. STAT. 5/6-101(A); 42 U.S.C. § 2000e-3(a). As Respondent's claim relates to Title VII's anti-retaliation clause, Respondent failed to comply with its procedural requirement. JA 84-92. There is a fabric of civil rights laws that protects against retaliation in the employment context, and Section 1981 should not be read to subsume and nullify all such statutes. *Domino's Pizza,* 546 U.S. at 479 (Section 1981 was not "meant to provide an omnibus remedy for all racial injustice"); *Patterson*, 491 U.S. at 188 (Section 1981 "is

only one part of Congress' extensive civil rights legislation").

To endorse the argument that Section 1981 would become a dead letter without protection against retaliation, the Court would have to create the boundaries for such protection. Under Title VII, an individual is protected against retaliation if he/she testifies at a hearing or during an investigation of an alleged incident of racial discrimination. 42 U.S.C. § 2000e-3(a). Based on Respondent's logic, this same individual should be protected under Section 1981 because it would allegedly encourage compliance with Section 1981. However, this individual would then have a cause of action under Section 1981 irrespective of his/her race and/or the existence of racial discrimination. *See Domino's Pizza*, 546 U.S. at 476 (noting that racial discrimination is necessary for a cause of action under Section 1981). *See also Patterson*, 491 U.S. at 171; *Runyon*, 427 U.S. at 168; *Santa Fe Trail Transp.*, 427 U.S. at 286-287; *Rachel*, 384 U.S. at 791. He/she would also have a cause of action under Section 1981 without even alleging the existence of a contract. *See Domino's Pizza*, 546 U.S. at 476 ("Any claim brought under § 1981 . . . must initially identify an impaired 'contractual relationship . . . under which the plaintiff has rights.").

Respondent's position would require this Court to draft an operative anti-retaliation clause in Section 1981, which would have no cap on damages. Congress, as delineated in Petitioner's Merits Brief, has consistently included anti-retaliation clauses in anti-discrimination statutes where it chooses to do so. Pet. Br. 15-18. *See also* Civil Rights Act of 1991, Pub. L.

102-166, 105 Stat. 1071, Title III, § 312 (Congress creating an anti-retaliation provision in another part of the Civil Rights Act of 1991). It is not the role, nor the right, of a court to create such a clause as the Seventh Circuit did in this case. *See* U.S. CONST. ART. I, § 1.

Accordingly, this Court should not endorse Respondent's position, and it should reverse the Seventh Circuit.

V. RESPONDENT'S ATTEMPTED RELIANCE ON *STARE DECISIS* IS FLAWED.

Respondent and his *amici*, particularly the Government, contend that *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), and *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), require this Court to affirm the Seventh Circuit's decision in the case at bar. *See* Resp. Br. 35-39; United States Amicus Br. 13-19. This is an attempt to invoke principles of *stare decisis* and proclaim that other cases addressing different factual circumstances, and different statutory provisions, necessitate an outcome favorable to Respondent. Such is not the case, nor should this Court entertain such an argument.[3]

Stare decisis promotes the adherence to precedent for the stability and predictability of Congress' body of

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[3] Petitioner notes that some responses to this argument were addressed in its Merits Brief. Pet. Br. 33-39. In addition to those arguments, Petitioner is obligated to address the issue of *stare decisis* and its inapplicability to the case at bar.

law. *See Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986). A decision of this Court that Section 1981 does not provide for a cause of action based on retaliation, however, does not conflict with either *Sullivan* or *Jackson*. *Sullivan* and *Jackson* deal with distinct factual circumstances – namely, *Sullivan* deals with property rights, and *Jackson* deals with gender discrimination by recipients of federal education funding. *Sullivan* and *Jackson* address separate and distinct statutes – namely, *Sullivan* addresses 42 U.S.C. § 1982, and *Jackson* addresses 20 U.S.C. § 1681 *et seq.*, otherwise known as Title IX. Neither 42 U.S.C. § 1982 nor Title IX were amended in the Civil Rights Act of 1991, as Section 1981 was, when Congress knew this Court would analyze its statutes based on the statutes' text. Also, as explained in Petitioner's Merits Brief, Respondent's argument concerning Section 1981 implicates and affects Title VII and all other fair employment practice legislation enacted by the states in a way 42 U.S.C. § 1982 and Title IX do not. *See* Pet. Br. 33-39. The entire *corpus juris* created by Congress will be thrown into upheaval if the Court endorses Respondent's line of reasoning and ignores Section 1981's text: (1) citizens will be forced to guess and/or assume what Congress means in a statute, if Congress is not required to specifically state its intentions; and (2) Title VII's applicability to retaliation based on a complaint concerning racial discrimination, which currently limits damages for such a cause of action in the employment context, will be completely nullified. *See* Pet. Br. 21-33, 39-42. Because different statutory provisions protecting different wrongs are at issue in *Sullivan*, *Jackson*, and this case, *stare decisis* does not apply.

Furthermore, "*[s]tare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). *See also Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 59 n. 30 (1977); *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 854 (1992) ("*stare decisis* is not an 'inexorable command'"). Where the Court examines prior holdings, "its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case." *Casey*, 505 U.S. at 854. The Court may look at: (1) "whether related principles of law have so far developed as to have the old rule no more than a remnant of abandoned doctrine," *see Patterson*, 491 U.S. at 173-74; and (2) "whether facts have so changed, or come to be seen so differently as to have robbed the old rule of significant application or justification," *see Burnet v. Colorado Oil & Gas Co.*, 285 U.S. 393, 412 (1932). *Casey*, 505 U.S. at 854-55. Indeed, this Court has stated that "when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944)). This Court should not feel constrained to follow *Sullivan* or *Jackson* in this case where there is no textual support in Section 1981 for the Seventh Circuit's decision. By overruling the Seventh Circuit, this Court would be upholding one of the oldest and most important

principles of law in this Country – that courts are to enforce statutes according to their terms. *See Lamie*, 540 U.S. at 534; *Hartford Underwriters*, 530 U.S. at 6; *Ron Pair Enter.*, 489 U.S. at 241; *Caminetti*, 242 U.S. at 485; *Bate Refrigerating*, 157 U.S. at 33; *Rollins*, 130 U.S. at 670.

For these reasons, and those stated in Petitioner's Merits Brief, *stare decisis* does not apply, and this Court should reject the notion that *Sullivan* and *Jackson* govern the outcome in this case.

VI. RESPONDENT'S CREATION OF FACTS AND NEW ALLEGATIONS IN HIS BRIEF APPEARS TO BE AN ATTEMPT TO MOVE THE FOCUS OF THE CASE AWAY FROM THE QUESTION PRESENTED.

As mentioned at the outset of this Reply Brief, Respondent appears to ignore the issue in this case – namely, whether a cause of action for retaliation exists under Section 1981. Respondent not only avoids the real issue in this case, but Respondent continually points to alleged facts and findings to support his newly created arguments. However, many of those facts and findings are inaccurate and present arguments that were not present in Respondent's Complaint, nor in any pleading filed in this case that Petitioner can find. Accordingly, Petitioner addresses some of those inaccuracies below.

First, Respondent insists that "[o]n June 2, 2003, [Respondent] timely filed a *pro se* complaint, against [Petitioner], alleging race discrimination and retaliation under Title VII . . . ." Resp. Br. 6. This is

inaccurate and appears to be an effort to support Respondent's contention that he is not making an end-run around Title VII. The District Court, however, explicitly found that Respondent failed to timely file his Title VII claims. *See* JA 84-92. Respondent never appealed this issue.

Second, Respondent asserts that "[t]he Seventh Circuit acknowledged that [Petitioner] forfeited its argument about the viability of [Respondent's] section 1981 retaliation claim, but nevertheless chose to resolve the question 'in the interests of justice.'" Resp. Br. 8 n. 1. In the same vein, Respondent claims that "Petitioner's failure to raise [the] issue below makes this an inappropriate vehicle for consideration of the question presented." Id.

Despite Respondent's suggestions to the contrary, the Seventh Circuit never found, nor did it "acknowledge[]," that Petitioner forfeited its argument as to the viability of a retaliation cause of action under Section 1981. *See* JA 121-22. The Seventh Circuit specifically noted that it chose to address the issue presently at bar "irrespective of whether [Petitioner] forfeited the issue or not." JA 121-22 n. 1. As described in the Seventh Circuit's decision, there had been at least a perceived change in the law among practitioners and courts alike, JA 122, and this change required Petitioner to raise the narrow issue at the Seventh Circuit, which fully addressed it.

Additionally, the Seventh Circuit acted within its discretion when it decided to address whether Respondent has a cause of action based on retaliation under Section 1981. *See Singelton v. Wulff*, 428 U.S.

106, 120 (1976) ("The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases."). *See also Hormel v. Helvering*, 312 U.S. 552, 557 (1941) ("There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below."). The facts of this case command resolution of this issue.

After the summary judgment briefing and immediately preceding the District Court's grant of summary judgment in favor of Petitioner, the Seventh Circuit issued *Hart v. Transit Management of Racine, Inc.*, 426 F.3d 863, 866 (2005), which specifically stated:

> Retaliation is grounds for relief under Title VII of the Civil Rights Act of 1964, which makes it unlawful for any employer to discriminate against an employee for opposing a practice made unlawful by the Act, but § 1981, in contrast, encompasses only racial discrimination on account of the plaintiff's race and does not include a prohibition against retaliation for opposing racial discrimination.

This new case law, as Petitioner argued, caused Respondent's appeal to the Seventh Circuit on the issue of retaliation to lack any merit. JA 121. Petitioner was required to specifically address this issue in defending against Respondent's appeal.

Furthermore, Petitioner, while not specifically addressing Section 1981 retaliation, raised a general defense to Respondent's claim before the District Court when Petitioner asserted in its answer that Respondent failed to state a claim upon which relief could be granted in this case. JA 77. The Seventh Circuit acted well within its discretionary power and in the interest of justice when it decided to address the issue brought before it in this case, *see* JA 121-23, and this Court should not endorse Respondent's waiver argument.

Third, Respondent has created an entirely new line of argument for his case before this Court. Respondent now appears to argue that Petitioner's Open Door Policy potentially created a contractual relationship between Petitioner and Respondent. *See* Resp. Br. 27-28. However, Respondent further acknowledges that he did not fully "develop[]" this issue at the District Court or on appeal. Resp. Br. 28 n. 8. Respondent did not fully develop this issue because it was never alleged in his Complaint. *See* JA 29-59 (Respondent's Complaint and Amended Complaint). Respondent's failure to raise this issue is further exemplified by the fact that he never disputed the "at-will nature of [his] employment" relationship with Petitioner. *See* JA 137 n. 7. "Employment at will" is "[e]mployment that is usu[ally] undertaken without a contract and that may be terminated at any time, by either the employer or the employee without cause." BLACK'S LAW DICTIONARY 545 (7th ed. 1999) (defining "employment at will").

Whether or not Petitioner allowed Respondent to "enforce" what he now attempts to claim was a

contract is irrelevant to the question at bar. The only issue is whether Respondent has a cause of action based on retaliation pursuant to Section 1981. Absent pleading and proving racial discrimination, which Respondent cannot do because he abandoned those claims, *see* JA 115 and 158, Respondent does not have a cause of action under Section 1981.

Finally, the arguments in Petitioner's Merits Brief are based on sound principles of statutory construction. Petitioner requests that this Court not give credence to Respondent's inaccurate characterizations of Petitioner's arguments. A noteworthy example of one such inaccuracy is where Respondent states: "[P]etitioner argues . . . that Congress intended Title VII – not any other statute – 'to govern claims of race discrimination and retaliation in the employment context.'" Resp. Br. 40.

Respondent takes Petitioner's statement completely out of context. To be precise, Petitioner made the following statement in Petitioner's Merits Brief: "The Seventh Circuit's decision threatens to eviscerate the administrative and procedural safeguards of Title VII that Congress specifically enacted to govern claims of race discrimination and retaliation in the employment context." Pet. Br. 9. It is beyond dispute that Title VII was enacted to specifically address employment discrimination and retaliation. The statement Respondent cites is part and parcel of Petitioner's argument that statutory construction demands a finding that Respondent does not have a cause of action under Section 1981 based on retaliation. *See* Pet. Br. 14-26.

CONCLUSION

Petitioner asks this Court to interpret Section 1981 as written. Section 1981's text does not, nor has it ever, provided for a cause of action based on retaliation. For the reasons stated in Petitioner's Merits Brief and this Reply Brief, the decision of the Seventh Circuit should be reversed.

Respectfully submitted,

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